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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass. 3/F
425 I Street N.W.
Washington, D.C. 20536

[redacted]

File: EAC 02 056 51734 Office: Vermont Service Center Date: MAR 08 2004

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER [redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage from the time of filing the labor certification.

On appeal, counsel states that the director's decision was based on a 2000 tax return that reflected the three months the business had been in operation. Counsel asserts that the 2001 tax return will clearly support the ability of the petitioner to pay the proffered wage.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petitioner's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. The petitioner's priority date in this

instance is April 30, 2001. The beneficiary's salary as stated on the labor certification is $23,000 per year.

With the petition, counsel submitted a copy of the petitioner's 2000 Form 1120, U.S. Corporation Income Tax Return. The tax return showed the petitioner incorporated on July 26, 2000 and reflects taxable income before net operating loss deduction and special deductions of negative $19,466. The return also reflects negative net current assets.

In a request for evidence (RFE) dated April 5, 2002, the director requested the 1999 federal income tax return and, if the beneficiary was employed by the petitioner, a copy of his 2000 Form W-2, Wage and Tax Statement. In response, counsel pointed out that the petitioner had only been in business since July of 2000, and submitted a complete copy of the petitioner's 2000 tax return. Counsel also stated that the information requested was not available for the beneficiary.

The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage from the priority date of the visa petition.

On appeal, counsel states that the petitioner has every intention of paying the proffered wage when the beneficiary becomes a permanent resident. Counsel also states the 2001 tax return provides clear evidence that the petitioner has sufficient resources to pay the proffered annual salary.

In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983).

Regardless of the petitioner's intention to pay the proffered wage at the time the beneficiary becomes a permanent residence, it is required by regulation to demonstrate it had the ability to pay the proffered wage at the time the priority date was established and continuing until the beneficiary becomes a lawful permanent resident. The 2001 Form 1120 reflects taxable income before net operating loss deduction and special deduction of negative

$12,167. The return also reflects current assets of $130,623 and current liabilities of $143,892 resulting in negative net current assets. The petitioner could not have paid the proffered salary from net current assets or its taxable income. While the 2001 taxes are most relevant to the petitioner's ability to pay the proffered wage as of the priority date established in 2001, the petitioner's 2000 taxes also demonstrate an inability to pay the proffered wage either from its taxable income or its net current assets. The AAO notes that while the director's decision was correct on this issue, he mistakenly added taxable income with cash. This is not consistent with accounting principles applying either a cash-basis or accrual accounting method of preparing tax returns.

Counsel also asserts on appeal that the addition of extra chefs such as the beneficiary and expanding hours of operation will increase the net sales and as a result, the petitioner could easily pay the beneficiary the proffered salary. This assertion is unpersuasive, as one does not necessarily follow the other. Counsel has not provided any standard or criterion for the evaluation of such claims. Additionally, the assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner is obliged by 8 C.F.R. § 204.5(g)(2) to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The evidence submitted does not demonstrate that the petitioner was able to pay the proffered wage in 2001 and continuing until present. Therefore, the petitioner has not established that it has had the continuing ability to pay the proffered salary beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.